S Veerasingam v Keretapi Tanah Melayu Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-21-92 OF 1994
KAMALANATHAN RATNAM J
15 DECEMBER 1998

Civil Procedure *— Action — Limitation period — Period of limitation in Public Authorities Protection Act 1948 was 36 months — Writ filed against first and second defendants within time — Whether third defendant alter ego of first defendant — Whether defence of limitation applied*

The plaintiff was employed as a station master by the then Keretapi Tanah Melayu ('KTM'). KTM was then corporatized and it became known as Keretapi Tanah Melayu Bhd ('the first defendant'). Pursuant to s 92(2) of the Railways Act 1991 ('the Act'), all property, rights and liabilities of the Malayan Railway Administration vested in the Railway Assets Corp ('the third defendant'). The plaintiff commenced this action against the first defendant and the Government of Malaysia ('the second defendant') seeking a declaration that the disciplinary action and the alleged termination against him were ultra vires and wrong in law. The first defendant later ceased to be a party to the suit after its appeal on its application to strike out this action against itself on grounds of there was no cause of action was allowed. However, the plaintiff amended his writ and statement of claim to include the third defendant as a party.

The third defendant argued that the cause of action must have accrued on 26 January 1992 as the letter amounting to a termination of the plaintiff's employment was to take effect on that date. Since the Public Authorities Protection Act 1948 ('the PAPA') states the period of limitation for the issuance of the writ was 36 months, and since the amended writ was served on the third defendant on 1 March 1995, the writ was clearly out of time and ought to be struck out as against them. The second defendant submitted that liabilities arising out of this case ought to be absorbed by the third defendant as the plaintiff was formerly an employer of the first defendant. On the other hand, the plaintiff argued that the issue of limitation did not arise against the first and second defendants since the writ against them was filed on 16 June 1994, which was well within the three years from the date the cause of action accrued. As against the third defendant, the plaintiff argued that it was the alter ego of the first defendant and therefore, it would be inequitable for the third defendant to now rely on s 97 of the Act read together with s 2(a) of the PAPA.

Held, dismissing the defendants' preliminary objection:

(1) It is a fact that the plaintiff's cause of action had accrued from the day the letter relating to the plaintiff's retirement was to take effect, that is 26 January 1992. Therefore, the plaintiff had up to 25 January 1995 to file this suit against the first and second defendants. His writ against them dated 16 June 1994 was therefore within time (see p 220E).

(2) By virtue of s 92(2) of the Act, all properties, rights and liabilities of the Malayan Railway Administration which then managed KTM shall, upon the commencement of the Act, vest with the third defendant. The Railways (Successor Company) Act 1991 then proceeded to define liabilities as including obligations of every description, whether present or future, actual or contingent. Here, the plaintiff had commenced an action against the first defendant within the statutory limitation period. That body had ceased to exist and the third defendant had taken over its assets and liabilities, which included the obligation to meet the claim of the plaintiff herein, if he succeeded (see p 220F–H).

(3) Section 97 of the Act read together with s 2(a) of the PAPA will only apply in respect of cases where the plaintiff had not commenced an action within the limitation period. The plea of limitation is a powerful defence and if it applied, it would deny a party a right of recourse. A party relying on the defence of limitation would be required to establish such a defence with clarity and without ambiguity. Clearly, the third defendant is the alter ego of the first defendant. Each of them is a creature of statute with continous perpetuation of the former's existence by the latter and an acceptance of the former's property, rights, liabilities and obligations by the latter. In the present situation, the defence of limitation did not apply (see p 221A–C).

[**Bahasa Malaysia summary**

Plaintif telah diambil bekerja sebagai pengurus stesyen oleh Keretapi Tanah Melayu ('KTM'). KTM kemudiannya telah dikorporatkan dan dikenali sebagai Keretapi Tanah Melayu Bhd ('defendan pertama'). Menurut s 92(2) Akta Keretapi 1991 ('Akta tersebut'), kesemua harta, hak-hak dan liabiliti-liabiliti Pentadbiran Keretapi Tanah Melayu akan terletak kepada Perbadanan Aset-Aset Keretapi ('defendan ketiga'). Plaintif mengambil tindakan ini terhadap defendan pertama dan Kerajaan Malaysia ('defendan kedua'), memohon satu deklarasi bahawa tindakan disiplin dan penamatan tugasnya adalah ultra vires dan salah di sisi undang-undang. Defendan pertama kemudiannya tidak lagi menjadi salah satu pihak di dalam tindakan tersebut setelah rayuannya terhadap permohonan untuk membatalkan dirinya sendiri daripada tindakan ini atas dasar tidak terdapat kausa tindakan dibenarkan. Walau bagaimanapun, plaintif telah meminda writ dan penyata tuntutannya untuk memasukkan defendan ketiga sebagai salah satu pihak.

Defendan ketiga telah menghujahkan bahawa kausa tindakan mesti telah terakru pada 26 Januari 1992 memandangkan surat yang membawa kepada penamatan tugas plaintif itu berkuatkuasa pada tarikh tersebut. Memandangkan Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA') menyatakan had masa bagi pengeluaran writ adalah 36 bulan, dan memandangkan writ yang dipinda itu telah

disampaikan kepada defendan ketiga pada 1 Mac 1995, jelas sekali writ tersebut telah melebihi had masa dan sepatutnya dibatalkan terhadap mereka. Defendan kedua menegaskan bahawa liabiliti yang timbul daripada kes ini sepatutnya ditanggung oleh defendan ketiga memandangkan plaintif adalah bekas pekerja defendan pertama. Sebaliknya, plaintif menghujahkan bahawa isu had masa tidak timbul bagi defendan pertama dan kedua kerana writ telah difailkan terhadap mereka pada 16 Jun 1994, iaitu masih lagi di dalam lingkungan tiga tahun daripada tarikh kausa tindakan terakru. Terhadap defendan ketiga pula, plaintif telah menghujahkan bahawa ia adalah alter ego kepada defendan pertama dan oleh itu, adalah tidak adil bagi defendan ketiga, sekarang ini, untuk bergantung kepada s 97 Akta dibaca bersama dengan s 2(a) APPBA.

Diputuskan, menolak bantahan awal defendan-defendan:

(1) Adalah satu kenyataan bahawa kausa tindakan plaintif telah terakru pada tarikh surat yang berhubung dengan persaraan plaintif itu berkuatkuasa, iaitu 26 Januari 1992. Oleh itu, plaintif mempunyai sehingga 25 Januari 1995 untuk memfailkan guaman terhadap defendan pertama dan kedua. Writnya yang difailkan terhadap mereka pada 16 Jun 1994 adalah dalam lingkungan had masa (lihat ms 220E).

(2) Di bawah s 92(2) Akta, kesemua harta-harta, hak-hak dan liabiliti-liabiliti Pentadbiran Keretapi Tanah Melayu yang pada masa itu diuruskan oleh KTM akan, dengan penguatkuasaan Akta tersebut, terletak pada defendan ketiga. Akta Keretapi (Syarikat Pengganti) 1991 kemudiannya telah mendefinasikan liabiliti-liabiliti sebagai termasuk berbagai bentuk tanggungjawab, samada pada masa kini atau pada masa hadapan, sebenar atau secara kebetulan. Di sini, plaintif telah mengambil tindakan terhadap defendan pertama di dalam lingkungan had masa statutori. Badan tersebut tidak lagi wujud dan defendan ketiga telah mengambil alih aset-aset dan liabiliti-liabilitinya, di mana termasuklah tanggungjawab untuk memenuhi tuntutan plaintif, jika dia berjaya (lihat ms 220F–H).

(3) Seksyen 97 Akta dibaca bersama s 2(a) APPBA hanya akan terpakai di dalam kes-kes di mana plaintif telah tidak mengambil tindakan di dalam lingkungan had masa. Alasan had masa adalah satu pembelaan yang kuat dan jika ianya terpakai, ia akan menafikan sesuatu pihak itu satu hak untuk tindakan. Sesuatu pihak yang bergantung kepada pembelaan had masa adalah diperlukan untuk mewujudkan satu pembelaan yang jelas dan tanpa kesamaran. Jelas sekali defendan ketiga adalah alter ego defendan pertama. Setiap satu mereka adalah satu mahluk statut dengan keberkekalan secara berterusan kewujudan yang pertama itu oleh yang kemudiannya dan satu penerimaan harta, hak-hak, liabiliti-liabiliti dan tanggungjawab-tanggungjawab yang pertama oleh yang kemudiannya itu. Di dalam situasi ini, pembelaan had masa tidak terpakai (lihat ms 221A–C).]

A **Notes**

For cases on an action's limitation period, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 109–111.

B **Legislation referred to**

Public Authorities Protection Act 1948 s 2(a)
Railways Act 1991 ss 89(1), 92(2), 97
Railways (Successor Company) Act 1991 s 2
Rules of the High Court 1980 O 29 r 9

C *Karpal Singh* (*Karpal Singh & Co*) for the plaintiff.
Azizah bte Haji Nawawi (Jabatan Peguam Negara) for the second defendant.
Jennifer Chandran (*Allen & Gledhill*) for the third defendant.

D **Kamalanathan Ratnam J**:

Facts

The plaintiff was at all material times employed as a station master by the then Keretapi Tanah Melayu ('KTM') which in the early days was a department of the Government of Malaysia ('the second defendant'). KTM
E was then corporatized and it became known as Keretapi Tanah Melayu Bhd ('the first defendant'). Then, pursuant to s 92(2) of the Railways Act 1991 ('the Act') which took effect from 1 August 1992, all property, rights and liabilities of the Malayan Railway Administration became vested in the Railway Assets Corp ('the third defendant') without the need for any
F conveyance, assignment or transfer.

On 18 February 1990, whilst the plaintiff was on duty at the Segambut Railway Station, an accident occurred involving two trains. An inquiry committee was set up to investigate the cause of the accident. For purposes of the present proceedings, I need not go much into the facts of the case. A show cause letter having been sent to the plaintiff to which he had replied,
G the plaintiff was informed that the inquiry committee having met, had found him liable for the said accident and that he was to be punished by a reduction in his salary by three points for a period of two years. The plaintiff's appeal against the said decision was dismissed by way of a letter dated 24 January 1992.

H In the midst of the plaintiff's aforesaid disciplinary proceedings and appeal, the Public Services Commission by its letter dated 27 February 1991 offered the plaintiff the position of station manager with the condition that the plaintiff would be on probation for one year prior to his confirmation. Upon his acceptance of the offer, the plaintiff was appointed station manager as of 20 March 1991.

I By a letter dated 10 January 1992, the plaintiff was informed by the Public Services Department ('the PSD') that the Government of Malaysia had decided to retire the plaintiff as of 26 January 1992. Being dissatisfied

with the decision of the PSD and after numerous appeals, the plaintiff commenced this action against the first and second defendants on 16 June 1994 seeking, inter alia, a declaration that the disciplinary action and the alleged termination were ultra vires and wrong in law.

Being aware of s 92 of the Act, the plaintiff applied to include the third defendant as a party to this action. In the draft statement of claim annexed to his affidavit in support of the said application, the plaintiff averred that it was necessary to bring in the third defendant as a party because the third defendant was deemed to have taken over the assets and liabilities of the first defendant. In the absence of the first defendant and as the second defendant did not object to the said application, an order in terms was granted on 9 February 1995. Since the plaintiff had failed to amend the writ pursuant to O 20 r 9 of the Rules of the High Court 1980 ('the RHC') which requires the amendment to have been done within 14 days from the date the order was made as no specific period within which the amendment was to be effected had been prayed for in the earlier application, the plaintiff made a further application and asked for a further 14 days from the date of the second order, to file the amended writ and statement of claim. Both the first and second defendants consented to this extension and a consent order was granted on 30 March 1995.

The plaintiff accordingly served the amended writ and statement of claim dated 1 March 1995 on the third defendant. Even in his submission, the plaintiff maintained that the amended writ was dated 1 March 1995. I have checked the writ as filed in the bundle of pleadings and the date of the amendment is shown as 1 March 1995. I am at a loss as to how the plaintiff could have dated the amended writ as 1 March 1995 when he was only given the second order to amend on 30 March 1995. Be that as it may, the third defendant had entered its normal appearance on 22 April 1995 and had filed its defence on 8 May 1995. The third defendant did not raise limitation as a defence. Subsequently, the defendant amended its defence to plead limitation.

In the meantime, the first defendant had applied to strike out this action against itself on the grounds that there was no cause of action. On appeal by the first defendant against the refusal of its application by the senior assistant registrar, to the learned judge, the said appeal was allowed on 8 December 1995. The first defendant therefore ceased to be a party to the suit.

By consent, parties agreed that the issue of limitation be heard before the trial.

Case for the third defendant

The third defendant relied on various sections of the Act. Section 89(1) reads as follows:

> There shall be established a body corporate by the name of 'Railway Assets Corporation' (hereinafter referred to as 'the Corporation') with perpetual succession and a common seal and may sue and be sued in its name and subject to and for the purposes of this Act, may enter into contracts, and may

A acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein vested in the Corporation upon such terms as it deems fit.

B Section 97 reads as follows:

> The Public Authorities Protection Act 1948 shall apply to any action, suit, prosecution or proceeding against the Corporation or against any officer or servant of the Corporation in respect of any act, neglect or default done or committed by him in such capacity.

C Section 2(a) of the Public Authorities Protection Act 1948 (Revised 1978) ('the PAPA') reads as follows:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority the following provisions shall have effect —
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> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of inquiry or damage, within thirty-six months next after the ceasing thereof; ... .

E The third defendant argued that since the act complained of by the plaintiff must necessarily be the letter relating to the plaintiff's retirement dated 10 January 1992, and which was to take effect from 26 January 1992, and which letter the plaintiff contends amounts to a termination of his employment, the cause of action must have accrued to the plaintiff on 26 January 1992. It was further submitted that since the PAPA was clearly F applicable to this suit and since the period of limitation for the issuance of the writ was 36 months and since this writ was issued out on 1 March 1995, the writ was clearly filed out of time and ought to be struck out as against the third defendant.

Case for the second defendant

G In a short submission, the second defendant referred me to s 92(2) of the Act which reads as follows:

> All property, rights and liabilities of the Malayan Railways Administration under the repealed Ordinance shall, upon the commencement of this Act, vest in the Corporation without any conveyance, assignment or transfer H whatsoever and all references to "Malayan Railway Administration", "Malayan Railway", or "General Manager, Malayan Railway" in relation to such property in any instrument, deed, title, document or written law shall be construed as if all such references were references to the "Railway Assets Corporation".

I I was also referred to s 2 of the Railways (Successor Company) Act 1991, which states that:

> 'liabilities' means liabilities, debts, charges, duties and obligations of every description (whether present or future, actual or contingent, and whether payable or to be observed or performed in Malaysia or elsewhere); ... .

It was the second defendant's submission that since the plaintiff herein was formerly employed by KTM, whatever liabilities arising out of this case ought to be absorbed by the third defendant. Relying on the third defendant's submission, the second defendant thus argued that if I was with the third defendant, then this suit should also be dismissed with costs as against the second defendant.

Case for the plaintiff

The plaintiff argued that in so far as the first and second defendants were concerned, the issue of limitation did not arise since the writ against them was filed on 16 June 1994, which was well within the three years from the date the cause of action accrued.

Relying heavily on s 92(2) of the Act, the plaintiff argued that for all intents and purposes, the third defendant was the alter ego of the first defendant and that it would therefore be inequitable for the third defendant to now rely on s 97 of the Act read together with s 2(a) of the PAPA.

Findings of the court

To my mind, the issue is quite simple. The plaintiff had sued the first and second defendants within the limitation period. I find as a fact that the plaintiff's cause of action indeed accrued from the day the letter relating to the plaintiff's retirement was to take effect, that is on 26 January 1992. In other words, the plaintiff had up to 25 January 1995 to file this suit against the first and second defendants. His writ against them dated 16 June 1994 was therefore well within time.

It seems to me that s 92(2) of the Act could not have been expressed in any clearer terms. All property, rights and liabilities of the Malayan Railway Administration which then managed KTM shall upon the commencement or the taking effect of the Act, vest with the third defendant. The section further expresses in no uncertain terms that such vesting is to be accepted without the requirement of any formal conveyance, assignment or transfer of such property, rights and liabilities. The Railways (Successor Company) Act 1991 then proceeds to define liabilities as including obligations of every description, whether present or future, actual or contingent.

Here the plaintiff had commenced an action against the first defendant within the statutory limitation period. That body has ceased to exist and the third defendant has taken over its assets and liabilities, which I find includes the obligation to meet the claim of the plaintiff herein, if he succeeds.

Ought to have amended, not to have added

In fact, what the plaintiff ought to have done was to have amended the first defendant by deleting it and in its place, substituting with the third defendant. Instead of doing that, the plaintiff proceeded to add the third defendant as a party, thus giving rise to this confusion. In any event, the effect is the same. The third defendant is merely wearing a new coat over the same body.

A Application of s 97

Section 97 of the Act read together with s 2(a) of the PAPA will only apply in respect of cases where the plaintiff had as yet not commenced an action within the limitation period. In such a case, the protection afforded by s 2(a) of the PAPA incorporated into s 97 of the Act would apply.

B The plea of limitation is a powerful defence and if it applies, it would deny a party a right of recourse. It is therefore pertinent that a party relying on the defence of limitation be required to establish such a defence with clarity and without any ambiguity. Clearly, the third defendant is the alter ego of the first defendant. Each of them is a creature of statute with a continuous perpetuation of the former's existence by the latter and an C untrammelled acceptance of the former's property, rights, liabilities and obligations by the latter. There is here no place at all for the defence of limitation.

The preliminary objection raised by the defendants is therefore dismissed with costs.

D *Preliminary objection dismissed.*

Reported by Mohd Rizal Abidin

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